2010 WL 4773186 (C.D.Cal.) (Trial Motion, Memorandum and Affidavit)
United States District Court, C.D. California.
Southern Division

Henry BROCKSCHMIDT and Linda Brockschmidt, individuals, Plaintiffs,
v.
LIBERTY MUTUAL FIRE INSURANCE COMPANY, a
corporation; and Does 1 through 30, inclusive, Defendants.

No. SA CV 10-0030 JVS (ANx).
September 14, 2010.

Plaintiff, Brockschmidts', Opposition to Defendant, Liberty Mutual's, Motion to Dismiss Plaintiffs' Third Cause of Action in First Amended Complaint; Memorandum of Points and Authorities in Support

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Date: September 27, 2010

Time: 1:30 p.m.

Crtm: 10-C

COMES NOW Plaintiffs, Henry and Linda Brockschmidt, (hereinafter referred to collectively as “BROCKSCHMIDT”), and files the herein Opposition to Defendant's, Liberty Mutual Insurance Company's, (hereinafter referred to as “LIBERTY”), Motion to Dismiss Plaintiff's Third Cause of Action for **Elder Abuse** and violations of California *Welfare & Institutions Code*, §15600, *et. seq.*

I. INTRODUCTION

After the 2008 amendments to the financial **abuse** statutes in the California *Welfare & Institutions Code*, linking “bad faith” to financial **abuse** of the **elderly** no longer became a prerequisite of the latter. LIBERTY erroneously believes so, has forwarded this old theory to the Court and relied on old law in an attempt to dismiss the BROCKSCHMIDT'S Third Cause of Action for (financial) **Elder Abuse**. For this reason, and since the First Amended Complaint states sufficient facts to support the Third Cause of Action, the Motion should be denied.

II. THE STATUTORY BACKGROUND ON ACTIONABLE FINANCIAL ABUSE

“Financial **abuse**” is defined by California *Welfare & Institutions Code* §15610.30. Actions for financial **abuse** are described at *Welf. & Inst. Code* §15657.5. The financial **abuse** statute was amended in 2008 and LIBERTY'S Motion is premised upon pre-2008 legislation. LIBERTY fails to take notice of the amendment and the consequences of the amendment when it filed the herein Motion to Dismiss. The previous statute made “bad faith” the centerpiece for establishing liability for financial **abuse** on **elders**. The fact is that after the 2008 amendment, financial **abuse** of the **elderly** became viewed and analyzed through the

lense of a "wrongful taking." Since LIBERTY'S Motion to Dismiss is premised upon "bad faith" conduct, or lack thereof, the Motion is improperly centered and should be denied.

Section 15610.30 states that "(a) 'Financial **abuse**' of an **elder** or dependent adult occurs when a person or entity does any of the following:

(1) Takes, secretes, appropriates, obtains, or retains real or personal property of an **elder** or dependent adult for a wrongful use or with intent to defraud, or both;

(2) Assists in taking, secreting, appropriating, obtaining, or retaining real or personal property of an **elder** or dependent adult for a wrongful use or with intent to defraud, or both;

(3) Takes, secretes, appropriates, obtains, or retains, or assists in taking, secreting, appropriating, obtaining, or retaining, real or personal property of an **elder** or dependent adult by undue influence, as defined in Section 1575 of the Civil Code."

Moreover, §15610.30(b)(1) goes on to provide that a "person or entity shall be deemed to have acted in bad faith if the person or entity knew or should have known that the **elder** or dependent adult had the right to have the property transferred or made readily available...". Thus, where the defendant knows, or reasonably should know, that the **elder** is entitled to have property made available to the **elder**, and fails to make that property available, the defendant commits financial **abuse** under the **Elder Abuse** Act. The Motion to Dismiss is misplaced and should be denied because of these shortcomings. LIBERTY cannot escape the inarguable fact that it conducted no meaningful, thorough or reasonable investigation into the claim to begin with. Certainly, by not even scoping, putting an eye on or climbing below the home to actually see the flood-site in question, casts a suspicious aura around LIBERTY as it appears to have taken advantage of two 80-year old insureds one of whom, Henry Brockschmidt, requires daily care and is not fully cognizant of his surroundings any longer. It is undisputed that LIBERTY sent no employee to survey or investigate below the subject home. LIBERTY did not physically, or visually, inspect the foundation at or near the flood site, or otherwise go below the flooring to put an eye on the foundation. Liberty did send an engineering firm that had been used numerous times in the past who ignored important evidence and wrote a report that sided with the company.

III. SUFFICIENT FACTS ARE PLED WHICH DEFEATS THE 12(b)(6) MOTION

In Paragraph Nos. 8 and 9, the First Amended Complaint, ("FAC"), plainly detailed that LIBERTY sent Jana H. Dexheimer to inspect the subject property. However, she did nothing about effectuating a visual inspection of the issue(s) LIBERTY raised below the home while it asserted the flood had been pre-existing; she did not substantiate this position, however ludicrous, by looking under the home. This is well pled.

In Paragraph No. 13 of the FAC, pled are sufficient facts which show LIBERTY then sent John Doyle to inspect the BROCKSCHMIDT home. He, like Ms. Dexheimer, also failed adequately inspect the home's foundation to substantiate LIBERTY'S position that the flood had been preexisting. In Paragraph Nos. 14 and 15, the FAC pleads sufficient facts how LIBERTY'S market underwriter, M.R. Usher, wrote to its insureds and stated the damage(s) to their home was due to long-term cracking" which clearly suggested the problems were pre-existing and fraudulently made; and how Ms. Dexheimer telephoned the BROCKSCHMIDTS who continued to play up the "pre-existing" theme.

In Paragraph Nos. 31 through 39, the FAC simply itemizes the requisite elements of *Welf. & Inst. Code* §15600, *et. seq.* in order to sustain the Third Cause of Action for **Elder Abuse**, which in the instant case, is of a financial nature. The "taking" of actual monetary proceeds (failing to pay the claim) constitutes the harm done to the BROCKSCHMIDTS which they allege was carried out, in part, because of their age and condition. These Paragraphs are sufficiently pled, use plain language from the post-2008 amended statutes and in correlation with Paragraph Nos. 1 through 17 from the General Allegations portion of the FAC, defeat the instant Motion.

IV. LIBERTY IS LIABLE FOR FINANCIAL ABUSE

Despite the fact LIBERTY failed to visually inspect on that section of the house which might have substantiated its "pre-existing" position, LIEBRTY nonetheless sent the BROCKSCHMIDTS a denial letter. LIBERTY seemed to bank on statistics that the elderly will not contest, will not have the energy to fight, will not make a fuss or raise a red flag in so doing. It seems LIBERTY was secure in the fact that the BROCKSCHMIDT couple, both in their 80's, would instead give up and cave as a result of LIBERTY'S denial. It is likely LIBERTY calculated its denial on the odds the BROCKSCHMIDT'S would be unable, or unwilling, to deal with a marathon of administrative claim requirements, carefully laying such out after the initial denial in an attempt to get their insureds to merely: tire, give up and go away. At least, the company should have offered, at their expense, to have an engineer selected by the Brockschmidt's inspect the property when the conclusions of the company's engineer (Doyle) were called into question.

The obvious question becomes, is the right to benefits under the subject homeowner's insurance policy actual "property?" The answer is "Yes." As set forth by the court in *Estate of Mitchell* (2000) 76 Cal.App.4th 1378, 1392, for example:

"[A] contract right which has been earned or purchase for a consideration ***is property***, even though its enjoyment may be contingent upon future events. [Citations.] Such a right 'cannot be defeated or diminished without [the holder's] agreement and it is therefore a valuable property right'." *Id.* (Emphasis added).

Since the right to the provision of benefits or services under an insurance policy constitutes a property right, the failure to make the promised services or indemnity "readily available to the elder" by wrongfully denying benefits constitutes financial abuse under the Elder Abuse Act and triggers the cause of action. Since the BROCKSCHMIDTS are in fact elderly, both over the age of 80 and Henry Brockschmidt in obvious declining health, LIBERTY well knew the demographics of its insureds. Surely by the time LIBERTY had sent its structural engineer, John Doyle, to the subject home, he knew full well that the BROCKSCHMIDTS were advanced elderly insureds and unsophisticated with structural engineering matters.

The Elder Abuse Act applies to anyone age 65 or older or anyone between the ages of 18 and 64 who qualifies as a "dependent adult." *Welf. & Inst. Code* §§15600, 15610.27, 15610.23. A "dependent adult" is someone "who has a physical or mental limitation that restricts his or her ability to carry out normal activities to protect his or her rights, including, but not limited to, any person who has physical or developmental disabilities...". *Welf. & Inst. Code* §15610.23(a). Thus, someone who is totally disabled would arguably qualify as a dependent adult and entitled to bring an action under the Elder Abuse Act.

There is a conclusive presumption of financial abuse when the person, breaching party, tortfeasor or offender knew or should have known that his/her or its conduct would be likely to be harmful to the elder. *Welf & Inst. Code* §15610.30(b). This section relies on a subjective and objective test for knowledge that the conduct in question would or would not be harmful to elders. When it appears to be harm caused to one's person or their interest in property, as we have here in this case, the only requirement is whether a reasonable person would have known that the conduct in question would or would be likely to harm. Section (c) clarities "takes" as if the elder is deprived (of property); in this case, insurance proceeds. It is clear from this statute that "a taking" from an elder is effectuated even if the elder retains all indicia of ownership, including possession of real or personal property.

Welf. & Inst. Code §15657.6 states that there is in fact liability for failure to return property (for any reason) whether the property was wrongfully taken, or whether the taking in any way injured the elder. This is a new theory of liability and, again, it comes straight from the post-2008 amendments. The Third Cause of Action for Elder Abuse is pled with particularity, citing the Plaintiff's age, condition and chronicling LIBERTY'S conduct in the face of their age and (in)abilities which appear to have been taken advantage of and used against them when it failed to properly undertake a thorough investigation of the premises, or offer to pay for a second engineering survey when the first one was called into question. [1]

LIBERTY relies on *Negrete v. Fidelity & Guaranty Life Insurance Company* (2006) 444 F.Supp.2d 998 to make its larger point linking "financial **abuse**" in edler **abuse**-law to "bad faith." Again, this concept and 2006 case, along this point, is completely inapplicable subsequent to the aforementioned 2008 amendments to the subject statute. Insureds have a right to the quiet enjoyment of their home and certain contractual expectations with a homeowner policy, including but not limited to a fair, thorough and meaningful investigation into a claim made under a policy. Withholding rightful insurance benefits prevented the BROCKSCHMIDTS from enjoying their home, especially without ever putting an eye on the vital areas of the home. Its failures took advantage of the insureds **elder** status and physical/cognitive conditions.

LIBERTY also claims it does not have a fiduciary relationship with its insureds, the BROCKSCHMIDTS. That is irrelevant because one does not have to have a fiduciary relationship with an opposing party in order to **abuse** them financially with a "taking" of insurance proceeds. Never has this conduct been tied to whether or not a defendant, such as LIBERTY, was a fiduciary to its insured. There exists no case or statute which lays this out as a requirement. Lastly, attorneys fees are in fact a legitimate remedy for the BROCKSCHMIDTS to pursue under *Welf. & Inst Code* §15657.5 in addition to compensatory damages and all other remedies provided by law.

V. CONCLUSION

WHEREFORE, Plaintiffs respectfully request the Court deny the Motion to Strike the Third Cause of Action for **Elder Abuse**/ financial **abuse**. The facts are well pled, they are presumed to be true at this stage of the litigation, the pleading stage, and the 2008 amendments on financial **abuse** support the Third Cause of Action. If there is any question as to its factual applicability, plaintiffs request the right to amend this cause of action.

Dated: September 13, 2010

LAW OFFICES OF ROBERT K. SCOTT

By: <<signature>>

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HENRY BROCKSCHMIDT and

LINDA BROCKSCHMIDT

Footnotes

1 Had this been a landlord-tenant relationship-there is no doubt but that "**elder abuse**" would apply if the landlord refused to pay for the repairs.

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